U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 September 2003

CASE NO.: 2002-BLA-389

In the Matter of:

RUTH L. BOWERSOX, Widow of
KENNETH BOWERSOX,
Claimant

v.

MARK MINING II, INC.,
Employer

and

OLD REPUBLIC INSURANCE CO.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-In-Interest

APPEARANCES:

Heath M. Long, Esquire,
For the Claimant

George H. Thompson, Esquire,
For the Employer/Carrier

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 901 *et seq.* ("the Act"). This case was referred to the Office of Administrative Law Judges by the District Director, Office of Workers' Compensation Programs on July 5, 2002.

In a case involving a deceased coal miner, benefits are awarded to survivors of a miner whose death was caused by pneumoconiosis. Pneumoconiosis is defined in the Act as a chronic dust disease of the lungs arising from coal mine employment and the disease is commonly known as black lung.

Following proper notice to all parties, a formal hearing was held in regard to this claim on December 9, 2002, in State College, Pennsylvania. The Director's exhibits were offered in evidence at the hearing pursuant to 20 C.F.R. § 725.456, and the parties were afforded the opportunity to present additional evidence. Counsel also were allowed to submit closing arguments or briefs.

The findings of fact and conclusions of law set forth in this decision are based upon my analyses of the entire record and my observation of the demeanor of the witness who testified at the hearing. Each exhibit and argument of the parties, although perhaps not specifically mentioned, has been carefully reviewed and thoughtfully considered. Where the contents of certain medical evidence in the record appear inconsistent with the conclusions reached in this decision, it should be considered that the appraisal of the relative merits of each item of medical evidence has been conducted in conformance with the quality standards of the Regulations.

Section numbers hereinafter cited exclusively pertain to Title 20, Code of Federal Regulations. References to DX, CX, EX, and ALJX pertain to the exhibits of the Director, Claimant, Employer, and this Court, respectively. There were 56 exhibits submitted on the Director's behalf, and were marked DX 1–56. (TR 5). The Claimant offered 2 exhibits, identified as CX 1–2. There were six exhibits offered and admitted by the Employer, marked as EX 1–6. The Employer also submitted a prehearing report, which was admitted as ALJX 1. The record was held open to allow the Claimant to submit an additional piece of evidence, which was received December 20, 2002, and admitted as CX 3. (TR 33). The Employer filed its closing comments on February 12, 2003.

ISSUES

The sole controverted issue for decision is: Whether the miner's death is due to pneumoconiosis? (DX 56; TR 6).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The claimant, Ruth L. Bowersox, married Kenneth Bowersox on November 22, 1947. (CX 3). Mr. Bowersox died on November 1, 2000. The cause of his death was listed as renal failure in the certificate of death. (DX 4). Mrs. Bowersox has not remarried. (DX 1).

Mrs. Bowersox filed the survivor's claim involved in this proceeding on December 20, 2000. (DX 1). The application was considered by the Director, Office of Workers' Compensation Programs and denied on June 25, 2001. (DX 10). An appeal was filed on June 26, 2001 and the case was referred to the Office of Administrative Law Judges on October 3, 2001. (DX 11, 20). On December 31, 2001, the matter was remanded to the District Director for determination of the responsible operator. (DX 27). The Employer filed a Motion for Reconsideration of the Remand on January 3, 2002, but the Administrative Law Judge denied the motion on January 17, 2002. (DX 28, 29). By letter dated May 2, 2002, counsel for the Employer/Carrier stated that

Mark Mining II, Inc./Old Republic Insurance Company is correctly named as the Responsible Operator in this matter and on July 5, 2002, the case was again referred to the Office of Administrative Law Judges. (DX 46, 56).

Responsible Operator

Mark Mining II, Inc., conceded it is the last employer in the coal mining industry for whom Mr. Bowersox worked for a cumulative total of at least one year and for one day after December 31, 1969. (TR 6). The company, therefore, is the properly designated the Responsible Operator in this case. 20 C.F.R. §§ 725.492 and 725.493. (DX 46).

Pneumoconiosis and Related Issues

I. Medical Evidence

The medical evidence of record is as follows:

A. X-rays

DATE OF X-RAY	DATE OF READING	EXHIBIT NO.	PHYSICIAN/ QUALIFICATIONS	READING
7/3/84	7/3/84	DX 8	R. F. Klemens	1/1, p/s, 6 zones
7/3/84	7/20/84 (Reread 7/24/84)	DX 8	J. S. Gordonson/ Board-certified Radiologist and B-reader	0/1, t/t, 6 zones

B. Pulmonary Function Studies

DATE	EXHIBIT	HEIGHT	AGE	FEV_1	MVV	FVC	TRACINGS	EFFORT	QUALIFYING
7/3/94	DX 8; DX 19-4	69"	59	2.6	106	3.1	Yes	Good	No

C. Arterial Blood Gas Studies

DATE	EXHIBIT	pCO_2 (mm.Hg.)	pO_2 (mm.Hg.)	RESTING/ AFTER EXERCISE	QUALIFYING
7/27/84	DX 8;	34	71	Resting	No
	DX 19-6	26	110	After exercise	No

D. Death Certificate

Kenneth Bowersox died on November 1, 2000. The death certificate lists renal failure as the immediate cause of death. (DX 4). Paralysis agitans, aspirations pneumonia, chronic obstructive pulmonary disease, and Alzheimer's disease were identified as other significant conditions contributing to death. (*Id.*)

E. Autopsy Report

An autopsy which was confined to the chest was performed by Dr. Ambat Bhaskar on November 1, 2000. In his report, Dr. Bhaskar first discussed his findings and made specific observations. (DX 5). In the right hilar nodes, he noted the presence of anthracotic pigment deposits with fibrous tissue proliferation. Two lymph nodes revealed nodular fibrosis. Dr. Bhaskar found anthracotic pigment deposits throughout the right lung. In the upper lobe, he also noted nodules of 0.5 centimeters to 0.8 centimeters. In the middle lobe, he found focal areas of collapse, emphysematic changes, and one section with nodules of 1 centimeter. In the lower lobe, Dr. Bhaskar observed congestion and neutrophilic infiltrates in the alveoli, which he stated was compatible with right lobar pneumonia.

In the left hilar node, Dr. Bhaskar again determined there was anthracotic pigment deposits with fibrous tissue proliferation, nodule formation, fibrosis, and focal areas of necrosis. In the upper lobe of the left lung, he observed focal areas of anthracotic pigment deposits with fibrous tissue proliferation. His examination also revealed subpleural anthracotic pigment deposits with fibrous tissue proliferation with plaque formation. The lung parenchyma showed congestion. Sections from the lower lobe revealed marked congestions and focal areas of collapse.

The final anatomical diagnoses were listed as:

1. right lower lobe lobar pneumonia
2. congestion both lower lobes
3. coal workers' pneumoconiosis involving both lungs with 0.5 to 1 cm. nodules seen subpleurally and in the parenchyma
4. no evidence of massive fibrosis
5. grade III atherosclerosis of aorta
6. left ventricular hypertrophy with partial occlusion of the left main coronary artery due to calcific atherosclerotic plaque
7. no evidence of myocardial infarction is present.

(DX 5).

F. Medical Reports

Mr. Bowersox was examined by Dr. Robert F. Klemens on July 3, 1984. The physician conducted a chest X-ray, pulmonary function studies and arterial blood gas tests. Dr. Klemens noted the patient's prior medical history, including previous surgeries, as well as family history. He reported the miner's coal mine employment history of 30 years and a smoking history of 3/4 pack of cigarettes per day for 40 years, lasting until autumn 1983. He noted complaints of cough and sputum, which was black, for approximately 12 or 13 years, dyspnea for about 8 or 10 years,

and nighttime wheezing for 4 or 5 years. Dr. Klemens diagnosed coal worker's pneumoconiosis based on his X-ray and 30 years of work in the coal mines. (DX 8).

The record includes a Cytology Report, dated July 30, 1992, signed by Dr. Bhaskar. He noted clinical information of left lingular infiltrate, history of chronic obstructive pulmonary disease and shortness of breath, and a productive cough for six months. Dr. Bhaskar also observed that Mr. Bowersox worked in the mines, and had a smoking history of 1½ packs per day for 48 years. The diagnosis was negative for malignant cells, noting acute inflammatory cells present with cellular debris. (DX 49, EX 6).

Dr. Everett F. Oesterling, Jr., reviewed the medical reports and autopsy slides, and submitted a report dated July 26, 2001, advising counsel for the Employer of his findings. Dr. Oesterling, who is Board-certified in Pathology and Nuclear Medicine, noted that both lower lobes had some aspirations. He opined that the death of the lung tissue was probably from "venous stasis in the lower lobes from his pneumonia and bedfast condition" required by his neurological disease. He stated further that coal workers' pneumoconiosis did not contribute to the death of the miner. It was his opinion that Mr. Bowersox's death was caused by a respiratory impairment due to cigarette smoking and bronchospastic disease, and areas of bronchopneumonia from aspiration of gastric content, complicated by extensive areas of acute hemorrhagic pulmonary infarction. Dr. Oesterling observed that the "mild micronodular coalworkers' pneumoconiosis is of no significance in the evolution of this gentleman's terminal disease processes nor did it contribute to his lifetime symptomatology." (DX 18). In a follow-up report dated January 8, 2002, Dr. Oesterling reiterated his opinion that coal workers' pneumoconiosis was not a factor in the death of Mr. Bowersox. Dr. Oesterling concluded that death resulted from "bronchospastic induced and cigarette smoke induced emphysema, extensive aspiration pneumonia, and areas of microinfarction involving the lower lobes." (DX 26; EX 4).

In his deposition, held October 29, 2002, Dr. Oesterling stated that he did not have enough clinical and pathological evidence to determine a cause of death, because there were multiple disease processes. However, Dr. Oesterling asserted that he had sufficient information to determine the pulmonary cause of death. Dr. Oesterling again observed that he found mild micronodular coal workers' pneumoconiosis, moderately severe centrilobular pulmonary emphysema, which he attributed to asthmatic bronchitis and cigarette smoking, and "very significant lobar pneumonia," attributed to an aspiration. Dr. Oesterling noted the aspiration after observing what appeared to be vegetable matter, which he determined from the substance's structure, in the right lower lobe of Mr. Bowersox's lung. He acknowledged, however, the a previous test for aspirations was negative. Dr. Oesterling opined that the aspiration pneumonia was not related to pneumoconiosis or coal mine dust exposure. He did not think the emphysema or the pneumoconiosis was sufficient to cause death, nor was it a substantial contributing factor. Dr. Oesterling disagreed with Drs. Perper and Rizkalla regarding a finding of cor pulmonale; he stated that both of Mr. Bowersox's ventricles were enlarged proportionately. However, he also did not find the one centimeter nodule described by the autopsy prosector; he further challenged the makeup of that nodule, asserting that it was not sampled. (EX 5).

Dr. Peter G. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Diseases, reviewed the medical evidence of record and discussed his findings in a report dated October 28, 2001. He noted a 40-year smoking history of 3/4 of a pack per day. Dr. Tuteur stated that Mr. Bowersox suffered from mild simple coal workers' pneumoconiosis, among other medical conditions. He opined that neither the pneumoconiosis, nor his chronic obstructive pulmonary disease played any role in causing, hastening, or contributing to death. Dr. Tuteur further advised that although Mr. Bowersox suffered from simple coal workers' pneumoconiosis, it was of

insufficient severity and profusion as to cause a pulmonary impairment or disability during the miner's life. (DX 23, EX 1). In a supplemental report dated January 2, 2002, Dr. Tuteur opined with reasonable medical certainty that the centrilobular emphysema listed in the autopsy report is related to the miner's long history of cigarette smoking. He further opined that Mr. Bowersox "died with, but not because of, cigarette smoke-induced emphysema." (DX 25, EX 2).

Dr. Tuteur also testified via deposition on June 25, 2002. He first discussed his reviews of the other medical reports. He further opined about Mr. Bowersox's condition at death, especially with conditions such as aspirations and emphysema. For example, Dr. Tuteur acknowledged that there is some controversy over whether centrilobular emphysema is associated with inhaling coal mine dust. He also opined that the emphysema was a minor contributing factor in Mr. Bowersox's death, but not a major contributing factor. However, Dr. Tuteur could not say whether it was a "substantial contributor". He then added that he could not rule emphysema out as a cause, but it did not influence Mr. Bowersox's clinical course in a "clinically significant way". Instead, Dr. Tuteur asserted that aspriation pneumonia was the cause of death. (EX 3).

In a report dated November 10, 2001, Dr. Joshua A. Perper, a Board-certified Pathologist, reviewed and thoroughly documented the medical evidence of record. Dr. Perper opined that Mr. Bowersox suffered from pneumoconiosis due to his longstanding exposure during his coal mine employment. He also asserted that the pneumoconiosis was substantial in degree, and was associated with emphysema and chronic obstructive pulmonary disease. Dr. Perper further added that pneumoconiosis was a substantial factor in causing, substantially contributing to or hastening Mr. Bowersox's death. Dr. Perper also included medical literature and citations relevant to his determination in this case. (DX 23, 39).

Dr. Perper also testified during a deposition held on October 7, 2002. He first explained aspiration pneumonia in detail, noting that he did not see any evidence of that condition in the autopsy slides. Dr. Perper acknowledged that, under increased magnification, he saw fiber consistent with vegetable matter, but no significant inflammation. He found scarring pleura consistent with anthracotic pigmentation, the presence of birefringent silica crystals, and tiny micronodules up to 1 millimeter. According to Dr. Perper, Mr. Bowersox's lung tissue showed areas of macular pigmentation around the blood vessels, and micronodules of pneumoconiosis settled around the parenchyma. Dr. Perper concluded that all of his findings were indicative of substantially severe exposure to dust atmosphere that contains coal and silica. Dr. Perper further opined that there was a close relationship between the miner's bronchopneumonia and his pneumoconiosis and emphysema. Dr. Perper testified that he did not diagnose cor pulmonale, but his findings were consistent with that condition. He determined that Mr. Bowersox had mild to moderate coal workers' pneumoconiosis, and that the miner died a respiratory death due to underlying moderate to severe centrilobular emphysema, caused, in part, by coal workers' pneumoconiosis and cigarette smoking. (CX 2).

Dr. John T. Schaaf, by report dated February 7, 2002, indicated he had reviewed the medical evidence of record. Dr. Schaaf is Board-certified in Internal Medicine, with subspecialties in Pulmonary Disease and Critical Care Medicine. It was his opinion that Mr. Bowersox did suffer from coal workers' pneumoconiosis and that the pneumoconiosis was a substantial contributor to the miner's death. Dr. Schaaf elaborated, noting that the evidence indicated a respiratory death, "with pneumonia as the precipitating terminal event." He opined that Mr. Bowersox's prognosis would have improved significantly and he would have been more likely to survive his final episode, if he was not burdened with his underlying lung disease. (DX 39).

Dr. Schaaf's deposition was held on May 6, 2002. Dr. Schaaf again opined that Mr. Bowersox died from pneumonia. While he could not identify the exact cause of the pneumonia, Dr. Schaaf did not see any evidence of aspiration pneumonia, or aspiration of food particles. He later noted that a previous test for aspiration was negative. He observed that Mr. Bowersox suffered from coal workers' pneumoconiosis, which damaged the lung. In addition, Mr. Bowersox developed pneumonia, which Dr. Schaaf described as "the kind of community acquired pneumonia that people get" with damaged lungs. According to Dr. Schaaf, the risk of death from pneumonia substantially increases when a patient has a significant underlying lung disease. (DX 51).

On March 22, 2002, Dr. Waheeb M. Rizkalla submitted a consultation report. After a review of the medical records, Dr. Rizkalla opined with a reasonable degree of medical certainty that Mr. Bowersox suffered from coal workers' pneumoconiosis and that the disease was a substantial contributing factor in his death. Dr. Rizkalla asserted that the pneumoconiosis induced centrilobular emphysema and cor pulmonale. He noted that the emphysema could have been caused by smoking, as well as pneumoconiosis. Moreover, Mr. Bowersox developed terminal bronchopenumonia in addition to his emphysema. According to Dr. Rizkalla, no aspiration material, such as a foreign body or food particles was found in either the bronchi or pulmonary tissue. (DX 41).

Dr. Rizkalla was deposed on August 28, 2002. He first explained the differences between the various classifications for nodules, such as macular, micronodular, and macronodular. Dr. Rizkalla also stated his findings, which included moderate to severe coal workers' pneumoconiosis, moderately severe centrilobular emphysema, and moderately severe focal dust emphysema. According to Dr. Rizkalla, the emphysema, which he believed was caused by coal dust and cigarette smoking, made the miner susceptible to infection and inflammation. The physician acknowledged a concern had been raised about aspiration, but he stated that he did not make such a finding. Upon reviewing the color microphotographs, Dr. Rizkalla observed a single foreign body in one field, on one slide. He said that the foreign body was not necessarily aspirated, but rather, could have been inhaled. Moreover, the finding was not enough to classify the miner's bronchopneumonia as aspiration pneumonia. Dr. Rizkalla noted anthrasilicotic pigment, but found no evidence of pulmonary infarction. He also challenged the death certificate, stating that renal failure was not the cause of death, but rather, secondary to pulmonary failure. Dr. Rizkalla opined that the miner died a respiratory death, that his pneumoconiosis was an underlying cause of death, and that coal dust exposure substantially contributed to, and accelerated, death. Dr. Rizkalla testified that Mr. Bowersox suffered from bi-ventricular hypertrophy, asserting that hypertension caused the hypertrophy on the left. The right side hypertrophy could have been a reflection of the left, but mainly secondary to lung disease. Dr. Rizkalla also testified that he did not believe that Mr. Bowersox suffered from venous stasis. (CX 1).

By letter dated May 11, 2002, Dr. John A. Michos advised the Department of Labor's Claims Examiner that based upon his review of the medical evidence, Mr. Bowersox had evidence of simple coal workers' pneumoconiosis. His opinion was based, in part, on the miner's 27-year history of coal mine employment. However, Dr. Michos stated that the limited amount of information was insufficient to enable him to determine whether death was caused or hastened by the pneumoconiosis. (DX 7). After the Claims Examiner provided additional medical evidence, in a July 5, 2001 follow-up letter, Dr. Michos advised that it was his medical opinion that there was still not enough information to make a conclusive decision as to whether pneumoconiosis contributed to the death of Mr. Bowersox. Dr. Michos noted that the arterial blood gas studies

yielded normal results on exercise and the pulmonary function test results were near normal. (DX 9).

II. Lay Testimony

The Claimant testified during the hearing. Mrs. Bowersox first noted that she and her husband were married November 22, 1947. (TR 11). They were married until his death, November 1, 2000, and she has not remarried. (*Id.*) No dependent children currently live with her. (*Id.*)

Mrs. Bowersox stated that her husband had worked in the coal mines for more than 24 years. (*Id.*) She had known him since 1946, and he was a miner then. He held some positions outside the coal mines, including work as a Fuller Brush salesman and a bus driver, as well as time at his uncle's cement block factory, a brick factory, and in construction. (*Id.*, TR 23-24). The couple moved in 1962, and he remained a miner until he stopped working, in 1982. (TR 12). He left mining due to a back injury. (TR 21). The Claimant said that her husband did not work anywhere after 1982. (TR 12, 21).

During the time he worked in the mines, Mr. Bowersox's positions included driving a shuttle car, shoveling coal with his father, and working as a shift foreman. (TR 16). When her husband came home from the mines, the Claimant asserted that "he was dirty and his clothes were dirty." (TR 17). She observed that he would shower, but some coal dust stayed with him, even in his pores, and would come out on the bedding and his shirt collars. (*Id.*)

Mr. Bowersox smoked when he first met the Claimant in 1946. (*Id.*) She testified that she was unsure as to exactly how many cigarettes her husband smoked each day, however, she acknowledged that he often told doctors and others that it was one-and-a-half packs per day. (TR 18-19, 30). The Claimant testified that Mr. Bowersox had quit smoking by 1962. (TR 18, 29).

According to the Claimant, Mr. Bowersox's breathing was fine in the late 1970's and early 1980's. (TR 13). She added that her husband's breathing bothered him a little when he left the mines. (TR 31). Over time, however, she noticed his breathing worsened, and he would cough and wheeze upon exertion or overheating. (TR 13). Mr. Bowersox enjoyed hunting, fishing and bowling, and his wife noted that he was active. (*Id.*) Over time, these activities decreased; for example, he stopped hunting "because he couldn't breathe out in the cold air. And he couldn't walk without suffering breathing problems." (TR 13-14). Over the years, his breathing continued to get worse. (TR 14). A couple of years before his death, Mr. Bowersox had a bed downstairs because he could no longer climb the stairs. (TR 15). They had a "concentrator" put in the house, and he had portable oxygen and a "pulmo aid" for a few years. (TR 15-16). The Claimant noted that her husband used inhalers to aid his breathing. (TR 27-28).

Prior to his death, Mr. Bowersox had developed Parkinson's disease, and possibly Alzheimer's disease. (TR 25). The Claimant stated that she cared for her husband until he went into the hospital. (TR 26). After an approximately one week hospitalization, Mr. Bowersox went to a nursing facility for about eleven days, then returned to the hospital. (TR 26-27). Mrs. Bowersox testified that she never heard a diagnosis of emphysema, and was not aware of any heart condition. (TR 27). The Claimant also noted that her husband suffered several mini-strokes, which occurred in the last couple years of his life. (TR 32).

Entitlement to Benefits

I. Miner

The Employer initially challenged Mr. Bowersox's status as a miner. (DX 56). At the hearing, the Employer stipulated that Mr. Bowersox was properly identified as miner. (TR 6). The evidence of record clearly supports that stipulation. Thus, I find that Mr. Bowersox was a miner.

II. Length of Employment

The Employer also initially challenged Mr. Bowersox's length of coal mine employment. During the hearing, the Employer stipulated to 24 years of coal mine employment. (TR 6). In her testimony, the Claimant said that her husband worked in the mines for "24 plus years." (TR 11). In denying Mr. Bowersox's living miner's claim, the Claim Examiner found 27 years of coal mine employment. I have reviewed all of the evidence, including Mr. Bowersox's statement of his employment history (DX 19-2), the Claimant's summary of her husband's employment history (DX 2), and Mr. Bowersox's Social Security statement of earnings (DX 3). Based on all of the evidence, I find that the Claimant has proven 28 years of coal mine employment.

III. Date of Filing

The Claimant filed this claim for benefits on December 28, 2000. The Employer has not challenged the timeliness of the filing. I find that the claim has been timely filed.

IV. Claimant's Eligibility

The Employer challenged the Claimant's status as an eligible survivor of the miner. (DX 56). At the hearing, Employer's counsel noted that the record contained no proof of the Claimant's relationship to the miner. (TR 6). Counsel further noted that he would not object to holding the record open for a posthearing submission, and that the Employer would not contest the issue if evidence was presented. (TR 7). On December 20, 2002, Claimant's counsel submitted a copy of the Claimant's marriage certificate. (CX 3). In its closing comments, the Employer stated that it was stipulating to the Claimant's eligibility as a survivor. (Closing Comments of Employer, at 2). Accordingly, I find that the Claimant is an eligible survivor of the miner, and thus, may properly pursue a survivor's claim for benefits.

V. Medical Eligibility

Title 20 C.F.R. Part 718 applies to claims filed on or after April 1, 1980. 20 C.F.R. § 718.2. Survivors may recover benefits if they establish that the miner had pneumoconiosis, the disease arose from coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§ 718.202, 718.203, and 718.205, respectively. This claim was filed on December 28, 2000, and thus, will be considered under Part 718.

A. Determination of Pneumoconiosis

In order to recover benefits under the Act, the Claimant must first establish the presence of pneumoconiosis. Pursuant to § 718.202, a Claimant can demonstrate pneumoconiosis by means of: (1) chest X-rays interpreted as being positive for the disease; or (2) biopsy or autopsy evidence; or (3) the presumptions described in §§ 718.304, 718.305 or 718.306 (if applicable); or (4) a finding by a physician that the disease is present, supported by a reasoned medical opinion, if the finding is based on objective medical evidence, such as blood gas studies, pulmonary function studies, physical exams, and medical and work histories.

Despite initially challenging the existence of pneumoconiosis, the Employer has stipulated to the existence of the presence of a mild degree of simple pneumoconiosis, citing the pathological evidence of record. (TR 6). After reviewing the evidence, particularly the X-ray evidence, the medical reports, and the autopsy report, I find that the Claimant has established that Mr. Bowersox had coal workers' pneumoconiosis.

B. Cause of Pneumoconiosis

Once it is determined that a miner suffered from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner, who was suffering from pneumoconiosis, was employed in the coal mines for at least ten years, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b).

Mr. Bowersox worked in the coal mines for 28 years. I also found that he suffered from pneumoconiosis. Thus, the Claimant is entitled to the presumption that her husband's pneumoconiosis arose out of his coal mine employment. The Employer has stipulated that the disease is related to coal mine employment. (TR 6). Therefore, I find that the Claimant has established that her husband's disease arose out of his coal mine employment.

C. Death Due to Pneumoconiosis

In order to be entitled to benefits, a survivor must show that the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). Death will be considered due to pneumoconiosis if : (1) competent medical evidence establishes that the miner's death was caused by pneumoconiosis; (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis; or (3) the presumption of § 718.304 applies. 20 C.F.R. § 718.205(c)(1-3). However, a survivor is not eligible where the miner's death was caused by a traumatic injury or a medical condition not related to pneumoconiosis, unless the evidence demonstrates that pneumoconiosis was, in fact, a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4).

The Benefits Review Board has decided that death is due to pneumoconiosis if the cause of death is "significantly related to or significantly aggravated by pneumoconiosis." *Foreman v. Peabody Coal Co.*, 8 B.L.R. 1-371, 1-374 (1985). The Regulations further state that pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. § 718.205(c)(5). Likewise, any condition that hastens the miner's death is a substantially contributing cause of death for the purposes of 20 C.F.R. § 718.205. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3rd Cir. 1989).

The death certificate, signed by Dr. Jacobs, listed renal failure as the immediate cause of death. Other significant conditions contributing to death included paralysis agitans, aspirations

pneumonia, chronic obstructive pulmonary disease, and Alzheimer's disease. However, a death certificate is an unreliable report of the miner's condition, and it is an error for an administrative law judge to accept the conclusions contained on the certificate where the record is silent on the physician's relevant qualifications or personal knowledge of the miner from which to assess the cause of death. *See Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *see also Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988). Neither Dr. Jacobs' qualifications, or any record of prior physician-patient relationship is included in the record. Moreover, a review of the record reveals that the death certificate was completed prior to receiving the autopsy results. Thus, I accord little weight to the findings listed on the death certificate.

An autopsy was completed on November 1, 2000. Autopsy evidence is the most reliable evidence of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). Greater weight may be accorded to the physician who performs the autopsy over one who reviews the autopsy slides. *Similia v. Bethlehem Mines Corp.*, 7 B.L.R. 1-535 (1984); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3rd Cir. 1982). In his autopsy report, Dr. Bhaskar identified seven anatomical diagnoses, including coal workers' pneumoconiosis in both lungs, with nodules of 0.5 centimeters to 1 centimeter in the parenchyma.

Six physicians submitted medical reviews in this case. Dr. Michos reviewed the records and issued reports, advising the Claims Examiner. Upon his first review, after considering limited evidence, he stated that was unable to determine whether pneumoconiosis caused or hastened death in this case. Additional evidence was forwarded to Dr. Michos. He then asserted that the evidence was insufficient to determine that death was caused by pneumoconiosis. Dr. Michos noted that his determination was based upon the miner's normal test results, which were obtained during a 1984 examination.

Drs. Oesterling and Tuteur concluded that pneumoconiosis did not contribute to or hasten Mr. Bowersox's death. Dr. Oesterling stated that he did not have enough evidence to determine the cause of death, however, there was enough evidence in the record to establish the cause of pulmonary death. According to Dr. Oesterling, the miner's death was caused by a respiratory impairment due to smoking and bronchospastic disease, extensive aspiration pneumonia, and areas of microinfarction in the lower lobes. Dr. Tuteur concurred in the role of aspirations in the miner's death. He also added that emphysema, which he attributed solely to cigarette smoking, was a minor, but not a major, contributing factor in Mr. Bowersox's death. He stated that could not say if it was a substantial contributing factor.

Drs. Perper, Rizkalla, and Schaaf, disagreeing with Drs. Oesterling and Tuteur, concluded that pneumoconiosis was a substantial contributing factor in Mr. Bowersox's death. Dr. Perper stated that Mr. Bowersox died a respiratory death. He found a close relationship between the miner's bronchopneumonia and his pneumoconiosis and emphysema. Dr. Perper opined that the emphysema was caused by both pneumoconiosis and smoking. Dr. Perper stated that he saw one example of a fiber consistent with vegetable matter, but concluded that this single example was insufficient for a finding of aspiration pneumonia. Dr. Rizkalla also noted a single foreign body in one field on one slide, and like Dr. Perper, concluded that this finding was insufficient to classify Mr. Bowersox's bronchopneumonia as aspiration pneumonia. Dr. Rizkalla further explained that the foreign body was potentially inhaled, not aspirated. Dr. Rizkalla asserted that the miner's emphysema, which he attributed to coal dust and smoking, made Mr. Bowersox more susceptible to infection. Dr. Rizkalla ultimately concluded that the miner died a respiratory death and coal dust exposure and pneumoconiosis substantially contributed to death. Dr. Schaaf likewise concluded pneumonia was the precipitating terminal event and pneumoconiosis substantially contributed to death. He did not find evidence of aspiration. Moreover, he added that when a

patient suffers from a significant underlying lung disease, the risk of death from pneumonia substantially increases.

In light of the apparent dispute, I must weigh the physicians' reports, considering their qualifications, as well as the quality of their reports. A documented and well reasoned medical opinion is entitled to greater weight. A documented opinion sets forth clinical findings, observations, facts, and other data used by the physician in making a diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). A reasoned opinion is one that is supported by the underlying documentation and data. *Id.*

First I note that Dr. Michos' qualifications are not in the record. Moreover, his determinations are equivocal, citing insufficient information to make a finding that pneumoconiosis contributed to death. Based on the foregoing, I accord his opinion less weight.

Dr. Bhaskar is the pathologist who completed the autopsy. Although his qualifications are also not in the record, I accord his opinion some weight as the actual autopsy prosector.

The remaining five reviewing physicians are well qualified. Dr. Oesterling is Board-certified in Anatomical Pathology, Clinical Pathology and Nuclear Medicine. Dr. Tuteur is Board-certified in Internal Medicine and Pulmonary Diseases. Dr. Perper is Board-certified in Anatomic and Forensic Pathology. Dr. Rizkalla's qualifications include Board-certifications in Anatomic and Clinical Pathology. Dr. Schaaf is Board-certified in Internal Medicine, with subspecialties in Pulmonary Diseases and Critical Care Medicine. The physicians have teaching and writing experience, and have all practiced medicine for a number of years.

While all of the physicians are well qualified, I accord greater weight to Drs. Perper and Rizkalla, based on the quality of their reports and testimony. Dr. Perper thoroughly documented the miner's medical background. His explanations, particularly in his deposition testimony, were well communicated, and provided clear bases for his determinations. He provided ample support for his findings through literature and scientific evidence. Similarly, Dr. Rizkalla provided clear definitions and informative explanations of different disease processes experienced by Mr. Bowersox. Drs. Perper and Rizkalla provided reasons and support for their disagreement with Dr. Oesterling's findings regarding asiprations. Dr. Perper, in particular, provided significant detail on the issue of aspirations. Moreover, their findings are supported by the autopsy report of Dr. Bhaskar.

Dr. Oesterling is accorded less weight because he bases much of his opinion on the diagnosis of aspirations after noting what appeared to be vegetable matter. This finding was not corroborated by the remaining pathologists, Drs. Perper and Rizkalla, nor was it found in the autopsy. Dr. Oesterling's reports are too narrow and do not sufficiently consider all of the underlying documentation and data, and thus, are not well reasoned. Dr. Tuteur and Dr. Schaaf, both Internists, disagreed over this finding of aspirations. Dr. Tuteur is likewise accorded less weight because he rejected pneumoconiosis as a contributor to the miner's emphysema, noting that there is some controversy over whether centrilobular emphysema is associated with inhalation of coal mine dust. He further discarded emphysema as a contributing factor in death with little reasoning or rationale. Dr. Tuteur's report is not as well reasoned as that of Drs. Perper and Rizkalla because it lacks the same degree of analysis and is not supported by the documentation and data.

Thus, after carefully considering all of the medical evidence, I find the reports and testimony of Drs. Perper and Rizkalla to be the most thoroughly documented and well reasoned. Therefore, I accord greater weight to their determinations.

Accordingly, noting that Drs. Perper and Rizkalla found pneumoconiosis substantially contributed to and hastened Mr. Bowersox's death, a well reasoned finding that is also supported by the autopsy report, I find that the Claimant has established that the miner died due to pneumoconiosis.

CONCLUSION

Through stipulation, the Claimant has established that she is a dependent, the miner had pneumoconiosis, and his pneumoconiosis was caused, at least in part, by coal mine dust exposure. The Employer and Carrier stipulated that they are properly identified as the Responsible Operator. I also found that Mr. Bowersox had 28 years of coal mine employment. Finally, the evidence established that the miner's death was due to pneumoconiosis.

ATTORNEY'S FEES

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Although the Claimant is entitled to an award of such fees, no award of attorney's fees for services rendered to the Claimant is made herein since no application has been received. Thirty days are hereby allowed to Claimant's counsel for the submission of such an application. Counsel's attention is directed to 20 C.F.R. §§ 725.365 and 725.366. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following the receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim for benefits of Ruth L. Bowersox, surviving spouse of Kenneth Bowersox, under the Black Lung Benefits Act is hereby GRANTED.

It is hereby ORDERED that Mark Mining II, Incorporated, and Old Republic Insurance Company shall pay to the Claimant, Ruth L. Bowersox, all benefits to which she is entitled to under the Act.

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ROBERT J. LESNICK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. S 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order, by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C., 20012-7601**. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Room N-2117, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., 20210.